

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs November 14, 2007

DERRICK M. CAREY v. STATE OF TENNESSEE

**Appeal from the Circuit Court for Hickman County
No. 07-50096-C Timothy Easter, Judge**

No. M2007-00683-CCA-R3-HC - Filed April 11, 2008

Petitioner, Derrick M. Carey, appeals the Hickman County Circuit Court's dismissal of his petition for writ of habeas corpus. In that petition, Petitioner sought a writ of habeas corpus to release him from his sentences for first degree murder and especially aggravated robbery. We are persuaded that the trial court was correct in summarily dismissing the habeas corpus petition because Petitioner did not demonstrate that his convictions were void. The judgment of the trial court is affirmed.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Trial Court is Affirmed.

JERRY L. SMITH, J., delivered the opinion of the court, in which DAVID H. WELLES, and JOHN EVERETT WILLIAMS, JJ., joined.

Derrick M. Carey, Pro Se, Only, Tennessee.

Robert E. Cooper, Jr., Attorney General & Reporter; Mark A. Fulks, Assistant Attorney General, and Ron Davis, District Attorney General, for the appellee, State of Tennessee.

OPINION

Factual Background

Petitioner pleaded guilty to first degree murder and especially aggravated robbery in Davidson County in 1993 after an incident at the Las Palmas Mexican Restaurant in Antioch. Pursuant to the plea agreement, Petitioner received consecutive sentences of life for first degree murder and twenty years for especially aggravated robbery. Petitioner subsequently sought post-conviction relief on the basis of ineffective assistance of counsel. On appeal, this Court affirmed the denial of post-conviction relief. *Derrick M. Carey v. State*, No. 01C01-9612-CR-00528, 1997 WL

7661463 (Tenn. Crim. App., at Nashville, Dec. 12, 1997), *perm. app. denied*, (Tenn. May 18, 1998 and Mar. 15, 1999).

On January 30, 2007, Petitioner filed an application for writ of habeas corpus in Hickman County. Petitioner claimed that the Davidson County Criminal Court lacked jurisdiction to order his sentences to run consecutively because of the way the judgment forms were worded. Specifically, Petitioner complained that Count 2 was ordered to run consecutively to Count 3 and Count 3 was ordered to run consecutively to Count 2. The trial court summarily dismissed the petition for habeas corpus relief. Petitioner filed a timely notice of appeal.

Analysis

Habeas Corpus Relief

The determination of whether to grant habeas corpus relief is a question of law. *See Hickman v. State*, 153 S.W.3d 16, 19 (Tenn. 2004). As such, we will review the habeas corpus court's findings de novo without a presumption of correctness. *Id.* Moreover, it is a petitioner's burden to demonstrate, by a preponderance of the evidence, "that the sentence is void or that the confinement is illegal." *Wyatt v. State*, 24 S.W.3d 319, 322 (Tenn. 2000).

Article I, section 15 of the Tennessee Constitution guarantees an accused the right to seek habeas corpus relief. *See Taylor v. State*, 995 S.W.2d 78, 83 (Tenn. 1999). A writ of habeas corpus is available only when it appears on the face of the judgment or the record that the convicting court was without jurisdiction to convict or sentence the defendant or that the defendant is still imprisoned despite the expiration of his sentence. *Archer v. State*, 851 S.W.2d 157, 164 (Tenn. 1993); *Potts v. State*, 833 S.W.2d 60, 62 (Tenn. 1992). In other words, habeas corpus relief may be sought only when the judgment is void, not merely voidable. *See Taylor*, 995 S.W.2d at 83. "A void judgment 'is one in which the judgment is facially invalid because the court lacked jurisdiction or authority to render the judgment or because the defendant's sentence has expired.' We have recognized that a sentence imposed in direct contravention of a statute, for example, is void and illegal." *Stephenson v. Carlton*, 28 S.W.3d 910, 911 (Tenn. 2000) (quoting *Taylor*, 955 S.W.2d at 83).

If after a review of the habeas petitioner's filings the habeas corpus court determines that the petitioner would not be entitled to relief, then the petition may be summarily dismissed. T.C.A. § 29-21-109; *State ex rel. Byrd v. Bomar*, 381 S.W.2d 280 (Tenn. 1964). Further, a habeas corpus court may summarily dismiss a petition for writ of habeas corpus without the appointment of a lawyer and without an evidentiary hearing if there is nothing on the face of the judgment to indicate that the convictions addressed therein are void. *Passarella v. State*, 891 S.W.2d 619 (Tenn. Crim. App. 1994), *superseded by statute as stated in State v. Steven S. Newman*, No. 02C01-9707-CC-00266, 1998 WL 104492, at *1 n.2 (Tenn. Crim. App., at Jackson, Mar. 11, 1998).

In this case, Petitioner claims that the judgment entered against him is void because it encompasses an illegal sentence. The judgment form for first degree murder reflects that the life

sentence is to be served consecutively to the sentence in Count 3, for especially aggravated robbery. The judgment form for especially aggravated robbery reflects that the twenty-year sentence for especially aggravated robbery is to be served consecutively to the life sentence for first degree murder in Count 2. Thus, Petitioner argues that the judgments each reflect that the sentence imposed is to be served consecutively to the sentence imposed in the other judgment. In other words, the judgments indicate that the sentences are in conflict with one another.

First, it is clear that Petitioner's sentence for life imprisonment has not expired. Second, Petitioner's claim of a void judgment based on each judgment ordering a consecutive sentence does not present a cognizable claim for habeas corpus relief. See *Willie L. Hicks, Jr. v. Kevin Myers*, No. E2004-02921-CCA-R3-HC, 2005 WL 2043832, at *1 (Tenn. Crim. App., at Knoxville, Aug. 22, 2005), *perm. app. denied*, (Tenn. Dec. 5, 2005). "Although [Petitioner] correctly describes each judgment as providing for its sentence to be served consecutively to the sentence imposed in the other judgment, [] the judgments are not thereby rendered void." *Id.* (footnote omitted). It is our view that the error does not entitle Petitioner to habeas corpus relief because it can be classified as a clerical error as opposed to a void judgment. See *Coleman v. Morgan*, 159 S.W.3d 887, 890 (Tenn. Crim. App. 2004). "For an illegal sentence claim to support a claim for habeas corpus relief, however, the illegality of the sentence must be egregious to the point of voidness Thus, mere clerical errors in the terms of a sentence may not give rise to a void judgment." *Id.* (citing *Cox v. State*, 53 S.W.3d 287, 292 (Tenn. Crim. App. 2001) and *Ronald W. Rice v. David Mills*, No. E2003-00328-CCA-R3-PC, 2003 WL 2197293, at *3-4 (Tenn. Crim. App., at Knoxville, Aug. 19, 2003)). As stated previously, "[a] void judgment is one in which the judgment is facially invalid because the court lacked jurisdiction or authority to render the judgment or because the defendant's sentence has expired." *Taylor*, 995 S.W.2d at 83. We determine that even if there were a definitive conflict between the sentences as stated on the judgments, such a conflict would not render the judgments void, and not subject to habeas corpus relief. Petitioner is not entitled to relief.

Conclusion

For the foregoing reasons, the judgment of the trial court is affirmed.

JERRY L. SMITH, JUDGE